(3)

No. 99-615

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

PERINI CORPORATION,

Petitioner,

- against -

THE CITY OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the notice provision of the Changes Clause, a federal regulation incorporated into the construction contract between a contractor and the City of New York for the performance of work on a municipal water treatment facility, a project partially funded by federal grant monies, should be strictly construed in accordance with New York law, where the parties agreed to be bound by New York law and resolution of the choice of law issue does not implicate any uniquely federal interest nor does it entail any significant conflict between an identifiable federal policy and the operation of state law.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit (Pet. Appendix A) is not reported in an official reporter. The Court of Appeals' summary order affirming the decision of the District Court for the Southern District

of New York is reported at 182 F.3d 901 (2d Cir. 1999). The opinion of the District Court (Pet. Appendix B) is reported at 18 F.Supp.2d 287 (S.D.N.Y. 1998).

STATEMENT OF FACTS

Congress declared that the objective of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, was to "restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). At the same time, Congress made manifestly clear its intention not to have federal law pre-empt the field of construction project management of water pollution control projects. Thus, in 33 U.S.C. § 1251 (b), Congress declared as a goal and policy:

> Congressional recognition, preservation, and protection of primary responsibilities and rights of States. . . . It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, ... It is the policy of Congress that the States manage the construction grant program under this Act . . . .

In parallel fashion the federal regulations applicable to such construction projects provided

> In the construction of treatment works program[sic] under the Clean Water Act (33 U.S.C. 1251 *et seq.*), it is E.P.A.'s[1] policy to delegate

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[1] The federal Environmental Protection Agency.

> determinations on individual projects to State agencies to the maximum extent possible . . . .

40 C.F.R. 33.001(g)(rev. July 1, 1993).

In the section of the E.P.A. regulations entitled "Recipient Responsibility," responsibility is delegated to the grant recipient for management of the project as follows:

> (a) the recipient is responsible for the settlement and satisfactory completion in accordance with sound business judgment and good administrative practice of all contractual and administrative issues arising out of subagreements entered into under the assistance program. This includes issuance of invitations for bids or requests for proposals, selection of contractors, award of subagreements, settlement of protests, claims, disputes and other related procurement matters.

40 CFR § 33.210(a)(rev. July 1, 1993).

Within the context of this statutory and regulatory framework, in December of 1993, Perini and the City of New York (the "City") entered into a construction contract (the "contract") for the replacement and improvement of certain facilities at the Coney Island Water Pollution Plant (the "project"). Under the Clean Water Act, the E.P.A. funded 55% of the contract, the price of which was some $40,000,000. The City provided the remaining funding.

Both the original grant agreement between the City and EPA and a subsequent amendment thereto increasing funding for the project mandated inclusion in the contract of

certain provisions set forth in the Code of Federal Regulations. Of particular concern here are the "Supersession Clause" and the "Changes Clause" to which it refers:

> The Supersession Clause
>
> 1. General
> (a) the owner and the contractor agree that the following supplemental general provisions apply to the work to be performed under this contract and that these provisions supersede any conflicting provisions of this contract.
>
> The Changes Clause
>
> 2. Changes
> (a) The owner may, at any time . . . by written order designated or indicated to be a change order, make any change in the work within the general scope of the contract . . . .
>
> (b) Any other written order or an oral order. . . from the owner, which causes any such change, shall be treated as a change order under this clause, if the contractor gives the owner written notice stating the date, circumstances, and source of the order and if the contractor regards the order as a change order.
>
> * * *
>
> (d) If any change under this clause causes an increase or decrease in the contractor's cost of, or the time required for, the performance of any part

of the work under this contract, whether or not changed by any order, an equitable adjustment shall be made and the contract modified in writing accordingly. However, except for claims based on defective specifications, no claim for any change under paragraph (b) of this section 2., shall be allowed for any costs incurred more than 20 days before the contractor gives written notice as there required. Also, in the case of defective specifications for which the owner is responsible, the equitable adjustment shall include any increased cost reasonably incurred by the contractor in attempting to comply with such defective specifications.

(e) If the contractor intends to assert a claim for an equitable adjustment under this clause, he must, within 30 days after receipt of a written change order under (a) above or the furnishing of a written notice under paragraph (b) of this section 2., submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period. The statement of claim hereunder may be included in the notice under paragraph (b) of this section 2.

40 C.F.R. Part 35 Appendix C-2 to Subpart E (1993).

In addition to the federally mandated clauses, the contract includes standard provisions providing for the making of changes to the contract and the issuance of change orders, Article 25; prescribing the methods of payment for contract changes: either by applicable contract unit prices, reasonable costs plus an allowance for overhead

and profit, or a negotiated payment, Article 26; and defining notice and documentation requirements respecting claims, Article 27

Also, Article 54 of the contract in pertinent part provides:

> No claims against the City for damages for breach of Contract or compensation for extra work shall be made or asserted in any action or proceeding at law or in equity, unless the Contractor shall have strictly complied with all requirements relating to the giving of notice and of information with respect to such claims as have been herein provided.

Finally, the contract contained a choice-of-law provision, Article 62, in which the parties agreed that the contract was to be governed by and construed in accordance with the laws of the State of New York.

During the course of work on the project, Perini and the City negotiated lump sum payments which, as the contractor certified, covered the "accurate, complete, and current" costs of the change orders involved in this litigation. Perini, however, claimed entitlement to compensation under the Changes Clause for alleged indirect costs beyond those agreed to by both parties and, upon the City's refusal to pay, brought this lawsuit.[2]

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[2] The kind of damages for which Perini is suing, increased costs attributable to changed contract conditions but not part of the changed work, are variously referred to as delay damages, impact costs or ripple costs.

Perini sought summary judgment establishing the City's liability on Perini's third cause of action, which sought an "equitable adjustment" of $16 million for the claimed indirect costs. The City cross-moved for summary judgment, arguing, *inter alia,* that the contractor's failure to comply with the notice provisions of the Changes Clause barred its claims. In opposing the City's cross-motion, Perini argued that its claims were viable because federal law governed interpretation of the Changes and Supersession Clauses and that federal courts and agencies would construe the notice requirements of the Changes Clause liberally.

The District Court found that 1) New York law governed interpretation of the notice provision of the Changes Clause; 2) New York courts construe such notice requirements strictly; and 3) Perini's evidence of notice did not demonstrate compliance with the notice requirements of the Changes Clause.[3]

The Court of Appeals affirmed. In its unreported summary order,[4] the Second Circuit agreed that New York

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[3] The District Court noted that Perini's failure to comply with the more lenient notice and documentation requirements of the Changes Clause obviated any need to consider the existence of a conflict between the Changes Clause and the more demanding notice and documentation provisions of Article 27 of the contract. 18 F.Supp.2d at 295 n. 8.

[4] Since the Second Circuit's summary order specifically provides that it "will not be published in the federal reporter and may not be cited as precedential authority to (continued...)

law governed interpretation of the notice provision of the Changes Clause. In so holding, the Court of Appeals cited to Linan-Faye Constr. Co. v. Housing Auth. of Camden, 49 F.3d 915, 919-21 (3d Cir. 1995 (holding that state law governed construction of the federally mandated termination clause despite use of federal funds for the project and adoption of forms authorized by the federal agency) and Brinderson Corp. v. Hampton Roads Sanitation Dist., 825 F.2d 41, 44-45 (4th Cir. 1987) (stating that the court was "not persuaded" by the contention that federal law controlled construction of a federally mandated clause in contract, but following federal law because state courts would follow do so in the absence of controlling state authority).

Furthermore, the Court of Appeals did not perceive any conflict between, on the one hand, the notice provision of the Changes Clause and, on the other hand, the contract clauses requiring strict construction of notice provisions and the application of New York law. The Court of Appeals, therefore, rejected Perini's argument that the Supersession Clause required nullification of the contractor's agreement that 1) it would comply strictly with the notice requirements of the Changes Clause; and 2) New York law would govern interpretation of the contract.

Finally, the Court of Appeals examined each of the documents that the contractor claimed constituted the notice required by the Changes Clause, finding that most were

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[4] (...continued)
this or any other court," it is difficult to comprehend petitioner's description of this decision as "the lead case of decision on this issue in the United States." Pet. 7.

untimely and that those that arguably were timely failed adequately to inform the City of the monetary extent of the damages claimed as the result of a particular change order, as the Changes Clause required.

ARGUMENT

THE DETERMINATION THAT THE NOTICE PROVISION OF THE CHANGES CLAUSE MUST BE STRICTLY ENFORCED AS PROVIDED BY THE CONTRACT AND IN ACCORDANCE WITH NEW YORK LAW FULLY COMPORTS WITH DECISIONS OF THIS COURT.

(1)

The decision of the Court of Appeals, affirming the decision of the District Court and holding that New York law governs the interpretation of the notice provision of the Changes Clause, is correct and does not conflict with any decision of this Court or any other court of appeals. Also correct is the finding of the Court of Appeals that there is no conflict between the Changes Clause's notice requirements and those clauses of the parties' contract requiring strict compliance with such requirements and construction of the contract under New York law. Accordingly, contrary to the contractor's arguments, the Supersession Clause of the contract does not require nullification of Perini's contractual agreements that it would strictly comply with the notice requirements of the Changes Clause as a precondition to assertion of a claim for payment under that provision and that New York law would govern interpretation of the contract.

Perini, in executing the contract, agreed to be bound by its choice of law provision, which required that it be construed in accordance with New York state law. Both federal and New York state courts recognize that where parties to a contract include a choice-of-law clause providing for construction of the agreement in accordance with New York state law, that clause generally must be honored, where, as here, New York has a reasonable relationship to the agreement. See for example Turtur v. Rothschild Registry Int'l, Inc., 26 F.3d 304, 310 (2d Cir. 1994); Woodling v. Garrett Corp., 813 F.2d 543 (2d Cir. 1986); Freedman v. Chemical Construction Corp., 43 N.Y.2d 260, 264 (1977).

Nonetheless, Perini, realizing that its claim for an equitable adjustment is barred when the notice provision of the Changes Clause is strictly construed as the contract and New York law require, seeks to nullify its agreement to be bound by the interpretation of the contract under New York law. Under New York law, as under federal law, however, the presumption remains that the contract will be interpreted according to New York law. [5] See Erie Railroad Co. v.

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[5] In Marine Midland Bank v. United Missouri Bank, 223 A.D.2d 119, 123 (1st Dep't 1996), for example, the New York Supreme Court, Appellate Division, First Department recently noted that a contract's choice of law provision might be held invalid only where the issue is of such overriding concern to the public policy of the other jurisdiction as to override the intent of the parties and the interest of the State of New York in enforcing its own

(continued...)

Tompkins, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State").

While, in the years since Erie, this Court has at times found federal law displaces state law, the exceptions have been few and the tests rigorous. As this Court explained in Boyle v. United Technologies, Inc., 487 U.S. 500 (1988), in most fields of activity, this Court "has refused to find federal pre-emption of state law in the absence of either a clear statutory prescription . . . or a direct conflict between federal and state law." 487 U.S. at 504 (citations omitted). Having cautioned against the broad use of federal common law in, for example, Miree v. DeKalb County, 433 U.S. 25, 31-32 (1977) (federal common law found not to govern air crash survivors' suit against the county as third-party beneficiaries of a contract between the county and the federal government), this Court, in Boyle, stated the test applicable to the choice of law question raised in this case. The Boyle Court found that federal common law only applies where there is 1) a "uniquely federal interest" and 2) a "significant conflict" between an identifiable federal policy or interest and the operation of state law. Boyle, 487 U.S. at 507. Compare Atherton v. F.D.I.C., 519 U.S. 213, 218 (1997) (normally when courts decide to fashion rules of federal common law, the guiding principle is that a significant conflict between some federal policy or interest and the use of state law must first be specifically shown).

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[5] (...continued)
policies.

As summarized recently by the Second Circuit, under the rule stated in Boyle, federal common law applies only in those limited situations where a uniform national rule is necessary to further the interests of the federal government. Marcus v. A.T.&T., 138 F.3d 46 (2d Cir. 1998). In Boyle this Court found uniquely federal interests to arise only in a few areas, such as: the obligations to, and rights of, the United States under its contracts; the liability of federal officers for official acts; and civil liabilities arising out of federal procurement contracts. 487 U.S. at 504-506. See also Woodward Governor Co. v. Curtiss-Wright Flight Systems, 164 F.3d 123, 127 (2d Cir. 1999). Thus, in Boyle, federal law was applied to determine the tort liability of an independent contractor which, under the federal procurement program, had provided helicopters to the U.S. Marines.[6] The narrow reach of the requirement

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[6] Perini makes the breathtaking leap from this Court's finding in Boyle that "state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a 'significant conflict' with federal policy and must be displaced," 487 U.S. at 512, to the totally unsupported observation that the Boyle Court "concluded that state laws that hold the contractor liable for Unforeseen Conditions, by exculpatory or other clauses present a 'significant conflict' with federal policy and must be displaced." Pet. 21. According to Perini, therefore, the Second Circuit's decision is in conflict with Boyle.

This is just one of the most salient misstatements contained in Perini's petition, many of which grow out of Perini's attempt to obscure the fundamental point that the contract at issue here is not a federal procurement contract.

(continued...)

for a uniform federal rule may be seen, for example, by the result in Marcus, supra, 138 F.3d at 54, where the Second Circuit applied the Boyle test to find no uniquely federal interest in preventing a carrier from misrepresenting the nature of its rates to customers, although the Federal Communications Act evidenced a federal interest in uniformity of charges in telecommunications.

(3)

The notice requirements of the Changes Clause found in the contract simply does not invoke a "uniquely

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[6] (...continued)
Thus, in its discussion of Boyle, Perini attempts to disregard the fact that, unlike the defendant in Boyle, who was a Government contractor which, under its contract, provided equipment to the federal government as part of the federal procurement program, Perini contracted with the City under the City's procurement program which, in part, benefitted from federal funding. Similarly, Perini repeatedly conflates federal and municipal procurement programs, for example, referring to United States. Government's "uniquely federal interest in its national procurement program." Pet. "i" and passim.

Perini's discussion of the split in authority as to whether the government contractor defense is available only to manufacturers of military products or extends also to Government contractors providing nonmilitary products to the federal government under the federal procurement program, Pet. 22-23, obviously, is totally irrelevant to this case, which does not involve either an assertion of the government contractor defense or federal procurement.

federal interest," and thus, under Boyle, federal common law does not apply to its interpretation.

"[T]he fact that a contract is subject to federal regulation does not, in itself, demonstrate that Congress meant that all aspects of its performance or nonperformance are to be governed by federal law rather than state law applicable to similar contracts in businesses not under federal regulation.'" Linan-Faye Construction Co., Inc., v. Housing Authority of City of Camden, 49 F.3d 915, 919 (3d Cir. 1995), quoting Virgin Islands Housing Authority v. Coastal General Construction Services Corp., 27 F.3d 911, 916 (3rd Cir. 1994). In Linan-Faye, supra, the parties entered into a contract which was funded in substantial part by a grant from the United States Department of Housing and Urban Development. 49 F.2d at 917. As here, the applicable federal regulations mandated the inclusion of certain provisions in the contract, including a termination for convenience clause. Id. at 921, 936. The Housing Authority terminated the contract, and the contractor commenced a federal action seeking specific performance and damages. The District Court, exercising diversity jurisdiction over the matter, applied federal, not New Jersey, common law in interpreting the federally-required termination for convenience clause. Id. at 919. However, the Court of Appeals for the Third Circuit applied the test articulated in Boyle and reversed with the direction that the District Court resolve all remaining issues in accordance with New Jersey law, holding that "it is the law of New Jersey that governs the interpretation of this contract." Id. at 921.

Brinderson Corporation v. Hampton Roads Sanitation District, 825 F.2d 41 (4th Cir. 1987), is a case

decided before the Supreme Court had articulated the clear test of Boyle. In Brinderson, the Fourth Circuit rejected the argument that federal law should control the construction of provisions drawn from federal regulations in a contract, partially funded by an E.P.A. grant, between a contractor and a regional subdivision of the Commonwealth of Virginia for the construction of a waste water treatment facility because such a result was required under Clearfield Trust Co. v. U.S., 318 U.S. 363 (1943). Thus, the Brinderson Court did not find that the facts of the case mandated the use of federal common law in order to assure the application of a uniform rule. 825 F.2d at 44. The Fourth Circuit, however, did hold that federal common law was relevant, but not because federally mandated provisions in state or municipal contracts carry with them federal common law. Rather, the Brinderson Court looked first to state law and found that federal common law was, in the absence of applicable Virginia case law on the subject, what Virginia courts would have adopted. The absence of Virginia precedents on the disputed issue contrasts sharply with this case, where there is extensive New York case law addressing the interpretation of the contractual notice provisions and requiring the strict compliance with such requirements.

J.A. Jones Constr. Co. v. City of New York, 753 F. Supp. 497, 505 (S.D.N.Y. 1990), is also instructive. In J.A. Jones, the contractor argued that the incorporation of federal regulations defining how to calculate payments for change orders and delays in a contract with New York City funded by an E.P.A. grant provided a basis for federal question jurisdiction under 28 U.S.C. § 1331 as well as jurisdiction pursuant to the federal declaratory judgment statute, 28 U.S.C. § 2201. In J.A. Jones, the District

Court rejected the contractor's arguments, finding that the construction of federal regulations incorporated in a federally funded construction contract does not present a substantial issue of federal law. 753 F. Supp. at 504-505.

It is a well-settled principle of statutory construction that a statute or a set of regulations must be construed as a whole and that its various sections must be considered together and with reference to each other. See Marine Carriers Corp. v. Fowler, 429 F.2d 702, 706 (2d Cir. 1970), cert. denied, 400 U.S. 1020 (1971), quoting Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935)("'[T]he meaning of a statute is to be looked for, not in any single section, but in all parts together and in their relation to the end in view.'"); Sanders v. Winship, 57 N.Y.2d 391, 395-396 (1982) ("[A] statute is to be viewed as a whole. To this end, all parts thereof, if possible, are to be harmonized to achieve the legislative purpose.").

Thus, both the Supersession Clause and the Changes Clause must be understood in the context of the Clean Water Act's clear embodiment of a Congressional intent to delegate responsibility for construction projects to the recipients of federal grants as indicated in the provisions of the applicable statute and regulations quoted above at pages 2-3.

Furthermore, Perini has not identified, because it cannot, any statutory declaration that federal law must govern in the interpretation of contracts for municipal projects funded by the E.P.A. under the Clean Water Act. Perhaps the strongest support the contractor can muster for its argument that, in the interest of uniformity, federal common law should be applied to interpret the notice

provision of the Changes Clause because a uniform policy is required a directive issued by President Reagan in 1988. Pet. 6-7, 19. As part of the Presidential "regulatory relief program," which aimed to reduce the burden of federal regulation and paperwork, the directive called for the publication of common regulations, thus aiming for consistency and uniformity among all federal assistance awarding agencies. 53 F.R. 8073. However, Perini cites to no case law indicating that the Reagan house-cleaning directive calls for, in the name of national uniformity, the application of federal common law to all contracts entered into by any recipient of federal funding. Indeed, the Court of Appeals for the Third Circuit found that the interest in uniformity in construction of federal contractual provisions is not enough to pose federal question issues. Virgin Islands Housing Authority v. Coastal General Construction Services Corp. 27 F.3d 911, 916 (3d Cir. 1994).

Therefore, given the expressed Congressional intent to delegate responsibility for management of construction projects to the recipients of E.P.A. grants, the contract's Supersession Clause itself cannot and does not, as Perini argues, operate to nullify or pre-empt other standard City contract provisions included in the contract that touch matters covered by the Changes Clause. Nor does it speak to the choice of law issue, much less mandate the application of federal common law to disputes over contract administration between a recipient of an E.P.A. grant and its chosen contractors. The Supersession Clause merely provides that the Changes Clause, as a "supplemental general provision" included in the contract, supersedes any conflicting provisions.

In sum, there is no uniquely federal interest entailed by the interpretation of the notice provision of the Changes Clause in a contract to which the federal government is not a party under a statutory and regulatory scheme in which responsibility for the construction of local facilities is delegated to the grant recipient.

(4)

Under Boyle, the existence of a uniquely federal interest is a necessary but not sufficient condition for the displacement of state law. 487 U.S. at 507. While that necessary condition plainly has not been met in this case, assuming it to have been met for the sake of argument, the existence of a conflict between the operation of New York law and an identifiable federal policy is similarly absent.

The contract, in Article 54, specifically requires strict enforcement of notice provisions. Furthermore, New York law enforces provisions requiring strict compliance with notice requirements in public contracts as conditions precedent to claims for extra compensation. See for example, A.H.A. Gen. Constr., Inc. v. New York City Housing Auth., 92 N.Y.2d 20 (1998); Westinghouse Electric Corp. v. New York City Transit Auth., 735 F. Supp. 1205, 1224 (S.D.N.Y. 1990).

On the other hand, under federal common law, in cases where contracts have not specified strict construction of notice provisions, courts at times liberally construe contractual notice provisions, excusing strict, formal compliance with certain kinds of notice provisions when actual or constructive notice of the underlying facts on the part of the contractee is found. See for example, Hoel-

Steffen Constr.Co. v. U.S., 456 F.2d 760, 768 (Ct. Cl. 1972); Copco Steel Co. v. U.S., 341 F.2d 590, 598 (Ct. Cl. 1965). It is worth noting, however, that, even where federal common law has been applied, a contractual provision requiring strict compliance with notice requirements may be enforced. See Aircraft Gear Corp. v. Kaman Aerospace Corp., 875 F. Supp. 485, 492-495 (N.D.Ill. 1995).

In attempting to confect an argument that the strict interpretation of the notice provision of the Changes Clause required by New York law conflicts with some significant federal policy, Perini discerns a federal policy that the government, not the contractor, should absorb the increased costs of delays, which policy mandates equitable adjustments that make contractors whole. The rationale for this supposed policy is that, in anticipation of such equitable adjustments, public contractors will not provide in their bids for contingency costs to cover indirect costs of delays. Thus, according to Perini, the equitable adjustment language of the Changes Clause embodies a federal policy designed to induce contractors to submit lower bid prices for public contracts. Pet. 8-12.[7] Perini understands this policy to entail an interpretation of the notice provision of the Changes Clause so liberal that no notice would be required

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[7] While Perini argues that its interpretation of the Changes Clause is necessary to prevent the submission by contractors of inflated bids, it should be noted that if the City finds bid prices to be inflated it can and does reject all bids and rebid the contract. Furthermore, if the E.P.A. finds bids inflated, it can refuse to fund the project.

as to "changes that the City itself had directed as the City had actual knowledge of such changes." Pet. 5.[8]

Perini relies primarily upon Foster Construction v. U.S., 435 F.2d 873 (Ct. Cl. 1970) in support of its argument that there is a federal policy that requires payment of all of a contractor's claimed indirect costs of delays relating to change orders. However, this Court should note that Foster deals only with the very narrow and specific issue of delays related to differing site conditions and involves consideration of issues not relevant here, such as the extent to which bidders should be able to rely upon the owner's representations concerning subsurface conditions as opposed to their own pre-bid investigations. 435 F.2d at 886-888. Kaiser Industries Corp. v. U.S., 340 F.2d 322 (Ct. Cl. 1965) and United Contractors v. U.S., 368 F.2d 585 (Ct. Cl. 1966), also cited by Perini, both similarly deal with changed subsurface conditions, which have a particular relation to bid prices. Pet. 8-10.

Indeed, contrary to Perini's argument, the Federal Circuit has held, on at least two occasions, that federal agencies in fact are free to place cost limitations on change orders issued pursuant to the Changes Clause. In Reliance

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[8] Perini does not deal with the fact that the notice provision requires notice of both the general nature and the monetary extent of the claim being asserted. The owner's knowledge of the fact of a contract change does not automatically supply it with knowledge of costs incurred by the contractor indirectly resulting from such a change.

If, as Perini states, the district court observed that "if the liberal federal law applied, Perini would prevail," Pet. 4-5, that statement does not occur in its reported decision.

Insurance Co. v. U.S., 20 Cl.Ct. 715 (Cl. Ct. 1990), aff'd 931 F.2d 863 (Fed. Cir. 1991), and Sante Fe Engineers v. U.S., 801 F.2d 379 (Fed. Cir. 1986), the underlying contracts included another federal regulation which limited the amount recoverable by the contractor for both overhead and profit with respect to changes to no more than 10% of the contractor's direct costs. Notwithstanding the "equitable adjustment" language of the Changes Clause, the Court in both cases upheld the costs limitations contained in the other regulation. In fact, in Reliance, the Court affirmed dismissal of the contractor's claim seeking $1.3 million in delay damages and held that such limitations apply "regardless of the size and scope of contract changes." 931 F.2d at 865.

Perini contrasts this supposed federal policy of reimbursing contractors for all claimed costs of delays with what it asserts is the City's policy of exculpating itself from liability for all increased costs due to delays. (Pet. 8-12). Perini then leaps to the conclusion that these supposed policy differences directly result in an inconsistency between federal and New York law with respect to the interpretation of the notice provision of the Changes Clause such that, in order to effectuate the intent of the regulations, federal common law must be applied.

The main point that must be made in response to Perini's policy argument is that this case only concerns the interpretation of notice requirements and, as the New York Court of Appeals has recently stated, in A.H.A General Construction, Inc. v. New York City Housing Auth., 92 N.Y.2d 20 (1998), notice provisions in public contracts are not exculpatory clauses, nor do they embody any substantive rule of liability for construction costs. Rather,

notice provisions are conditions precedent to recovery which serve salutary purposes with respect to protection of the public treasury. 92 N.Y.2d at 30-34. Indeed, as the Court of Appeals observed in A.H.A., notice provisions are intended to prevent precisely the situation raised in this litigation, the accumulation by a contractor of undocumented damages amounting to a substantial percentage of the actual price of the contract. See Id. at 34.[9] Since protection of the public fisc is the essential policy that may be seen also to underlay the federal regulations incorporated into contracts funded in part by EPA grants, there is no fundamental inconsistency to be found respecting the interpretation of contractual notice provisions.

Given the nature and function of the notice provisions at issue here, Perini's depiction of the City's procurement policy, and its supposed conflicts with federal procurement policy is simply not relevant. Furthermore, given that the contract at issue here, like all standard City contracts, provides for the issuance of change orders to compensate the contractor for the extra costs entailed by the performance of extra work, Perini's statements that it is the City's policy "to exculpate itself from all increased costs," Pet. 10, is patently absurd.

Perini's argument that the notice requirements of the Changes Clause as interpreted under the generally more liberal approach to such provisions of federal common law should displace the contract's requirement of strict compliance with notice provisions is supported by neither

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[9] In this case, Perini is claiming $16,000,000 in delay damages, approximately 40% over the contract price.

the holding of Boyle, the language of the Supersession Clause, nor by well-established principles of contract construction. There is, in sum, no significant conflict involved here.

Under both federal and New York common law it is a fundamental principle of contract construction that the contract should be read so as to give meaning to all of its provisions and to render them consistent with each other. Thus, a contract should be interpreted to give meaning to all of its parts. An interpretation that renders portions of the contract ineffective or meaningless should be avoided. See for example Mastrobuono v. Shearson Lehman Hutton, 514 U.S. 52 at 63 (1995); Fulton Cogeneration Associates v. Niagara Mohawk Power Corp., 84 F.3d 91, 99 (2d Cir 1996); W.W.W. Giancontieri, 77 N.Y.2d 157 (1990); Sunrise Mall Association v. Import Ally, 211 A.D.2d 711 (2d Dep't 1995).

Contract Article 54 and the notice requirements of the Changes Clause, therefore, under fundamental principles of contract interpretation, should not be read to conflict. In fact, they can easily occupy the Contract together, without the Supersession Clause nullifying any part of them. The federal notice requirements provide that the contractor must "within 30 days after receipt of a written change order . . . submit to the owner a written statement setting forth the general nature and monetary extent of such claim, unless the owner extends this period." This certainly does not conflict with Article 54, which merely requires strict compliance with the very notice obligations set forth in the Changes Clause.

While Perini argues that the Changes Clause's notice provision, liberally construed, should completely replace any other contractual notice provision, the language of the Supersession Clause does not mandate such a result. The Supersession Clause simply provides that the provisions of the Changes Clause supersede any "conflicting" provisions of the agreement. Were it intended that the provisions in the federal Changes Clause exclusively governed the contractor's obligation for notice, thus overriding the standard contract article requiring strict compliance with notice and reporting provisions, Article 54, the Supersession Clause would have said so.

This Court, in Barnett Bank of Marion County v. Nelson, 517 U.S. 25 (1996), in reviewing the tests for pre-emption, observed that a federal law may be in "irreconcilable conflict" with state law when compliance with both statutes may be a "physical impossibility," or the state law may "stand as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." 517 U.S. at 31. Accord City of New York v. Job-Lot Pushcart, 88 N.Y.2d 163, 167 (1996).

Here, Perini does not contend, nor could it, that it was impossible to comply with both the notice requirement of the Changes Clause and Article 54's requirement of strict compliance with contractual notice provisions. Accordingly, the notice provision of the federal Changes Clause, does not, as Perini contends, supersede the contract's requirement, in Article 54, of strict compliance with contractual notice provisions as a precondition for the assertion of any claims.

In sum, there is no inconsistency between federal policy respecting the notice provision of the Changes Clause and the operation of New York law in interpreting that provision. Thus, Perini cannot escape strict compliance with the contract's notice provisions as required by the contract and its construction under New York law. Furthermore, the Court below followed precedent established by this Court and consistent with that of other circuits in so finding.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

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Respectfully submitted,

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